Public Prosecutor v Maznah bt Abdussomad & Anor

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45B-71–03 OF 2013
AKHTAR TAHIR J
7 MAY 2014

Evidence — Character of accused — Conduct — Conduct of accused before and after commission of offence — Whether relevant and admissible evidence — Evidence Act 1950 s 8

Evidence — Admissibility — Information leading to fact discovered — Accused murdering stepmother by smothering her with pillow — Accused giving information leading to discovery of pillow — Whether relevant and admissible evidence — Evidence Act 1950 s 27

Criminal Procedure — Accomplice — Witness — Whether a person becomes an accomplice by merely suspecting an offence had been committed — Gold bracelet worn by deceased given by accused to SP7 — Whether SP7 an accomplice

Criminal Law — Murder — Juvenile — Juvenile accused ordered to be detained at the pleasure of Ruler of the State — Child Act 2001

Criminal Law — Penal Code — s 302 — Murder — Accused murdering stepmother by smothering her with pillow — Intention of causing death — Accused giving information leading to discovery of pillow — Whether inconclusive Post-motem report fatal to prosecution's case — Accused fleeing the scene after commission of offence — Gold bracelet worn by deceased recovered from accused — Inference from behaviour of accused on day of incident — Whether common intention proven — Whether pre arranged plan proven — Whether prosecution case proven beyond reasonable doubt — Penal Code ss 299, 300 & 302

Both accused were charged under s 302 read together with s 34 of the Penal Code with the murder of their stepmother ('the deceased'). On the day of incident, the second accused, SP12 (a friend of the second accused), the deceased and SP3 (husband of the deceased) were present in the house. SP2 (a daughter of the deceased) had visited the deceased on the same day but had left the house after a while. SP3 later found the deceased's body. Suspecting that there was an element of foul play in the death of the deceased, the body of the

deceased was exhumed but because of decomposition the pathologist could not determine the cause of death. A gold bracelet normally worn by the deceased was missing. The police managed to track down a missing bracelet to a pawn shop. The persons responsible for pawning the bracelet were identified as SP6 and his son, SP7. SP7 was the boyfriend of the second accused. The gold bracelet was given to SP7 by the second accused who was in need of money. The questioning of SP7 also led the police to the second accused who was arrested in a budget hotel with SP12. When being questioned, the second accused led SP8 to the house of the deceased to retrieve the murder weapon in the form of a pillow. The pillow had a blood stain which matched the DNA of the second accused. SP12 turned a state witness and testified that on the day in question she had gone to the house of the deceased to ask for aid to visit her child. SP3 however turned down the SP12's request forcing SP12 to turn to the second accused for help. The second accused suggested SP12 to take part in a plot to kill the deceased. According to the second accused this would solve the financial problem of SP12 and herself as well as the problems first accused who was despaired by the nagging from the deceased. According to SP12, the first and the second accused used a pillow to smother the deceased while SP12 held the leg of the deceased. The second accused then removed the gold bracelet and all the three of them fled the scene.

Held:

(1) SP7 could not be regarded as an accomplice by merely suspecting an offence had been committed. SP6 had absolutely no role to play as he had been handed the bracelet by his wife to be pawned and he did so without knowing the origin of the gold bracelet. The veracity of the evidence of these witnesses could be accepted as normal competent witnesses who had no reason to lie (see paras 29 & 31).

(2) SP12 fell squarely within the definition of an accomplice and going by her own admission had taken part in the commission of the crime. SP12's testimony in court was not spurred by any hatred towards the second accused. SP7 corroborated the evidence of SP12 of the events after SP12 and the second accused had left the house after the commission of the offence. The fact that the two accused and SP12 fled the scene supported the commission of the offence (see paras 35–38).

(3) The inconclusive post-mortem report as to the cause of death of the deceased was due to the fact that the body of the deceased had decomposed. However, a conclusive report of cause of death was not necessary in this case because the circumstances of the case were such that a reasonable inference could be drawn that the deceased died by being smothered with a pillow (see paras 41–42).

(4) There was evidence of information leading to the discovery of the weapon of offence, the pillow. The evidence of this was provided by SP8.

Information leading to discovery is a relevant piece of evidence against the accused as stated in s 27(1) of the Evidence Act 1950. The importance in the information provided by the second accused was not so much to its contents but the fact that it supported the evidence of SP12 that the deceased was smothered with a pillow (see paras 43 & 45).

(5) On the day of the incident SP2 noticed a changed atmosphere when she went to the house and noticed that both the accused were in the kitchen preparing food. These facts represented conduct of the accused both before the commission of the offence as well as after commission of the offence. These conduct were relevant facts to be considered by the court in incriminating the accused pursuant to s 8 of the Evidence Act 1950 (see paras 47 & 49).

(6) The first accused was a child under the Child Act 2001 at the time of the commission of the offence. Although the first accused came from a broken and splintered family there was nothing to indicate that she was driven to commit the crime for some cogent reason. In fact she was a voluntary participant and took on an active role. Hence, the first accused needed to be imprisoned at the pleasure of the Ruler of the State until such a time she was truly rehabilitated (see paras 70–71).

[Bahasa Malaysia summary

Kedua-dua tertuduh dituduh di bawah s 302 dibaca bersama-sama dengan s 34 Kanun Keseksaan kerana membunuh ibu tiri mereka ('si mati'). Pada hari kejadian, tertuduh kedua, SP12 (rakan tertuduh kedua), si mati dan SP3 (suami si mati) berada di rumah. SP2 (anak perempuan si mati) telah menziarahi si mati pada hari yang sama tetapi beredar daripada rumah selepas itu. SP3 kemudiannya menjumpai mayat si mati. Mengesyaki bahawa terdapat elemen jenayah dalam kematian si mati, mayat si mati digali semula tetapi kerana proses penguraian, ahli patologi tidak dapat mengenal pasti sebab kematian. Seutas gelang emas yang biasanya dipakai oleh si mati hilang. Pihak polis berjaya menjejaki gelang emas yang hilang tersebut di sebuah kedai pajakan. Pihak-pihak yang bertanggungjawab memajak gelang tersebut dikenalpasti sebagai SP6 dan anaknya SP7. SP7 merupakan teman lelaki tertuduh kedua. Gelang emas tersebut diberikan kepada SP7 oleh tertuduh kedua yang memerlukan wang. Soal siasat ke atas SP7 membawa kepada tertuduh kedua yang ditahan dalam sebuah hotel murah dengan SP12. Apabila disoal siasat, tertuduh kedua membawa SP8 ke rumah si mati untuk mendapatkan senjata yang digunakan untuk membunuh iaitu bantal. Bantal tersebut mempunyai kesan darah yang padan dengan DNA tertuduh kedua. SP12 menjadi saksi pendakwaan dan memberi keterangan bahawa pada hari kejadian, dia telah ke rumah si mati untuk membantu bantuan untuk melawat anaknya. Walau bagaimanapun SP3 menolak permohonan SP12, menyebabkan SP12 meminta pertolongan tertuduh kedua. Tertuduh kedua mencadangkan agar SP12 mengambil bahagian dalam plot untuk membunuh

si mati. Menurut tertuduh kedua, ini akan menyelesaikan masalah kewangan SP12 dan dirinya dan juga masalah-masalah tertuduh pertama yang merana akibat leteran si mati. Menurut SP12, tertuduh pertama dan kedua menggunakan bantal untuk melemaskan si mati manakala SP12 memegang kaki si mati. Tertuduh kedua kemudiannya menanggalkan gelang emas si mati dan ketiga-tiga mereka melarikan diri dari tempat kejadian.

Diputuskan:

(1) SP7 tidak boleh dianggap sebagai rakan subahat hanya semata-mata kerana dia mengesyaki satu kesalahan telah dilakukan. SP6 tidak memainkan sebarang peranan kerana dia telah diserahkan dengan gelang oleh isterinya untuk dipajak dan dia berbuat sedemikian tanpa mengetahui asal-usul gelang tersebut. Kebenaran keterangan saksi-saksi ini boleh diterima sebagai saksi-saksi normal yang kompeten yang tidak mempunyai sebab untuk menipu (lihat perenggan 29 & 31).

(2) SP12 jelas terjumlah dalam definisi rakan subahat dan dengan pengakuannya sendiri, telah mengambil bahagian dalam perlakuan jenayah tersebut. Keterangan SP12 dalam mahkamah tidak dirangsang oleh sebarang kebencian terhadap tertuduh kedua. SP7 menyokong keterangan SP12 mengenai kejadian-kejadian selepas SP12 dan tertuduh kedua telah meninggalkan rumah dan selepas perlakuan jenayah tersebut. Fakta bahawa kedua-dua tertuduh dan SP12 melarikan diri dari tempat kejadian menyokong perlakuan jenayah (lihat perenggan 35–38).

(3) Laporan bedah siasat mengenai sebab kematian si mati yang tidak meyakinkan adalah kerana mayat si mati telah melalui proses penguraian. Walau bagaimanapun, satu laporan muktamad mengenai sebab kematian tidak diperlukan dalam kes ini kerana hal-hal keadaan kes adalah sedemikian di mana satu inferens munasabah boleh dibuat bahawa si mati meninggal dunia akibat dilemaskan dengan bantal (lihat perenggan 41–42).

(4) Terdapat keterangan maklumat yang membawa kepada penemuan senjata jenayah iaitu bantal. Keterangan ini diberikan oleh SP8. Maklumat yang membawa kepada penemuan adalah keterangan yang relevan terhadap tertuduh seperti yang dinyatakan oleh s 27 Akta Keterangan 1950. Kepentingan maklumat yang diperuntukkan oleh tertuduh kedua bukanlah pada kandungannya tetapi fakta bahawa ia disokong oleh keterangan SP12 bahawa si mati dilemaskan dengan bantal (lihat perenggan 43 & 45).

(5) Pada hari kejadian, SP2 menyedari perubahan suasana apabila dia ke rumah tersebut dan melihat tertuduh berada di dapur menyediakan makanan. Fakta-fakta ini mewakili tindakan kedua-dua tertuduh sebelum perlakuan jenayah tersebut dan juga selepas perlakuan jenayah

tersebut. Perlakuan ini adalah fakta-fakta relavan yang harus dipertimbangkan oleh mahkamah dalam mendapati tertuduh bersalah di bawah s 8 Akta Keterangan 1950 (lihat perenggan 47 & 49).

(6) Tertuduh pertama adalah kanak-kanak di bawah Akta Kanak-Kanak 2001 pada masa perlakuan jenayah. Walaupun tertuduh pertama datang daripada keluarga yang tidak bahagia, tiada apa yang menunjukkan bahawa dia terdorong untuk melakukan jenayah tersebut atas apa-apa alasan kukuh. Malahan, dia adalah peserta sukarela dan memainkan peranan aktif. Oleh itu, tertuduh pertama perlu dipenjarakan atas perkenan Pemerintah Negeri hingga dia benar-benar telah dipulihkan (lihat perenggan 70–71).]

Notes

For a case on conduct, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 802.
For a case on information leading to fact discovered, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 102.
For cases on juvenile, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1642–1643.
For cases on s 302 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1642–1643.
For cases on witness, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1899–2031.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Liew Kaling v PP [1960] 1 MLJ 306b, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)

Legislation referred to

Child Act 2001 s 97
Criminal Procedure Code ss 180, 180(1), 182A(1)
Evidence Act 1950 ss 8, 8(i), 27(1), 114, 114(b), 133
Penal Code ss 34, 299, 300

Iswa bt Tonie (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Tan Teck Yew (Lua & Partners) for the accused.

Akhtar Tahir J:

THE CHARGE

[1] Both the accused in this case were charged as follows:

> Bahawa kamu bersama-sama pada 14 Julai 2012 jam lebih kurang 5.30 petang bertempat di alamat No 2, Lorong Kiyai Sujak 20B, Taman Sri Wangi, Kapar di dalam daerah Klang, di dalam negeri Selangor Darul Ehsan dalam mencapai niat bersama kamu berdua, telah melakukan bunuh dengan menyebabkan kematian terhadap Tanziah binti Zainuddin (No KPT: 400803–71–5230) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

THE FACTS

[2] As both the accused charged with the murder of the deceased Tanziah bt Zainuddin happen to be her step children and this offence being an inside job so to speak it is best to see the narration of facts in the light of who was at deceased residence at No 2, Lorong Kiyai Sujak 20B, Kapar on 14 July 2012.

[3] The evidence of the prosecution witnesses showed the presence of five persons at the residence on the day of incident. They were the two accused, a friend of the second accused by the name of Normah bt Abu Bakar ('SP12'), the deceased and her husband Hj Ahmad bin Sakimin ('SP3'). A daughter of the deceased by the name of Maryam bt Abdussomad ('SP2') had visited the deceased on the same day but had left the house after a while.

[4] SP3 a resident 'Imam' had left for prayers at 4.20pm to a nearby 'surau'. At that point of time he saw the deceased sleeping at the living room whilst the accused and SP12 were in various parts of the house. When he returned after prayers at about 6pm he saw the deceased still lying in the living room, but looking at her motionless and with the false teeth lying near her aroused his suspicion that something was not right. At the same time he did not see the two accused or SP12. SP3 then alerted his neighbours and a while later the ambulance arrived. It was then that the suspicions of the husband and the others were confirmed that the deceased had indeed died.

[5] The family members gathered to accord the deceased a burial. There was however an uneasiness on the part of the family members that all was not well. Their uneasiness was aroused further by the fact that there seem to be welts on the body of the deceased while bathing her body. The family members however decided that, to avoid any delay in the burial and to prevent any inconvenience caused if the matter was reported to the police, to proceed with the burial.

[6] However in the next couple of days after questioning the first accused the family members decided that there was an element of foul play in the death of the deceased. A police report was then lodged and the police in moving the investigations forwarded obtained a court order to exhume the body of the deceased. A post-mortem was duly done but because of decomposition the pathologist could not determine the cause of death. This could be seen from the Post-motem report (P23).

[7] A breakthrough in the police investigation was made on the complaint by the deceased family that a gold bracelet normally worn by the deceased was missing. On investigation the police managed to track down a missing bracelet worn by the deceased to a pawn shop.

[8] The persons responsible for pawning the bracelet were identified as Mohammad Sidek bin Othman ('SP6') and his son Muhammad Zumri bin Mohammad Sidek ('SP7'). Both SP6 and SP7 were hauled up by the police and on questioning the police discovered that SP7 was the boyfriend of the second accused.

[9] On further questioning it was determined that the gold bracelet was given to SP7 by the second accused who was in need of money. The questioning of SP7 also led the police to the second accused who was arrested in a budget hotel with SP12.

[10] A further breakthrough in the police investigation was made when being questioned, the second accused led Insp Jagjeet Singh a/l Hazura Singh ('SP8') to the house where the deceased was found dead to retrieve the murder weapon in the form of a pillow. The pillow was sent for forensic investigation. On examination of the pillow with the pillow case the chemist noted a blood stain. On analysis the blood stain matched the DNA of the second accused.

[11] The final piece of the jigsaw puzzle was provided by SP12 who turned a state witness. SP12 narrated how on the day in question she had gone to the house of the deceased to ask for aid to visit her child. She had once before requested the help of SP3 and knowing SP3 was a local *Imam*, SP12 believed he could collect funds on her behalf. SP3 however turned down the SP12's request forcing SP12 to turn to the second accused for help.

[12] The second accused suggested a way out of the predicament by asking SP12 to take part in a plot to kill the deceased. According to the second accused this would solve the financial problem of SP12 and herself as well as the problems first accused who was despaired by the constant nagging from the deceased.

[13] According to SP12 she was reluctant participant of the event leading to the death of the deceased. The main play going by the testimony of SP12 was done by the first and the second accused who used a pillow to smother the deceased while SP12 held the leg of the deceased. When the deceased finally succumbed to the attack evidenced by no more sound coming out from her, the second accused removed the gold bracelet and all the three of them fled the scene. The first accused went to her fiancees house whereas the second accused and Norma ended up in a budget hotel assisted by SP7.

EVALUATION OF THE PROSECUTION'S EVIDENCE AT THE END OF THE PROSECUTION'S CASE

Burden of proof

[14] The statutory duty enjoined upon the court at the end of the prosecution's case is as stated in s 180(1) of the Criminal Procedure Code which states that:

> When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

[15] The extent of the court's duty is amongst the plethora of cases stated also in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 as follows:

> The close of the prosecution's case subject to the evidence led by the prosecution in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits two or more inferences, then draw the inference that is most favourable to the accused.

[16] What amounts to 'prima facie' proof has been succinctly stated in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 as follows:

> ... The test at the close of the prosecution case would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no prima facie case.

Evidence of accomplice

(i) The father and son (SP6 and SP7)

[17] It is clear in this case that a gold bracelet was found in a pawn shop and this gold bracelet could be traced back to the second accused. The main issue

raised by the defence on the recovery of this gold bracelet was that there was nothing on the bracelet to indicate that it belonged to the deceased.

[18] On looking at the bracelet with the naked eye there could be dozens of such bracelet in the market as such designs were common.

[19] In this case however the sharp and experienced eye of the worker of the pawn shop Puah Lai Huat ('SP5'), detected a slight defect on the bracelet pawned by SP6 in the form of a slight nick. I took a close look at the bracelet and I did observe the nick. This defect was also mentioned in the pawn shop receipt.

[20] The pawning of this bracelet, working backwards showed the connection of the bracelet right to the second accused who gave the bracelet to SP7 to be pawned. SP7 gave the bracelet to his mother who in turn gave to SP6 to be pawned.

[21] From this sequence a reasonable inference could be drawn that the second accused had taken the bracelet from the deceased. SP3 and SP2 were absolutely certain that the deceased wore the bracelet all the time. However on the day when the deceased died this bracelet was missing.

[22] On this issue I decided as a fact that the bracelet tendered in court and retrieved from the pawn shop belonged to the deceased.

[23] The other area of concern in relation to the evidence of the SP6 and SP7 is whether they were accomplices to the crime committed by the second accused.

[24] An accomplice is to be regarded as a competent witness as mentioned in s 133 of the Evidence Act 1950 as follows: 'An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated evidence of an accomplice'.

[25] However s 114 of the Evidence Act 1950 under the caption 'Court may presume existence of certain fact' in (b) it is stated that 'an accomplice is unworthy of credit unless he is corroborated in material particulars'.

[26] Two matters that needed determination of court was whether SP6 and SP7 fell under the category of accomplices, and if so, the approach to be taken in evaluating their evidence.

[27] Who can be categorised as an accomplice has been discussed in numerous cases both local and abroad. For my part I have taken guidance from the commentaries on p 2081 of *Sarkar on Evidence* (15th Ed), 1999 where a number of interpretations are given to the word accomplice. The interpretations are as follows:

> The term (accomplice) in its fullness includes in its meaning all persons who have been concerned in the commission of a crime, al 'paticipes criminis', whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.
>
> An accomplice is a person who has concurred in the commission of an offence ... The new *Oxford Dictionary* says that 'accomplice' may be spelt as 'a complice' meaning a partner in crime, an associate in guilt. The term 'accomplice' signifies a guilty associate in crime; or when the witness sustains such a relation to the criminal act that he could jointly be indicted with the accused, he is an accomplice ...
>
> In two cases, however, persons who are not 'paticipes criminis' have been held to be accomplices namely (i) receivers of stolen peoperty have been held to be accomplices of the thieves from whom they receive goods, in trial for theft.
>
> The word 'accomplice' has not been defined by the Act and should therefore be presumed to have been used in the ordinary sense. An accomplice means a guilty associate or partner in crime, or who, in some way or other is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence ...

And finally 'It is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or not an accomplice therefore depends upon the facts in each particular case considered in connection with the nature of the crime ...'

[28] In this case I started off in determining whether SP6 and SP7 could be regarded as accomplices by the role played by them in this whole episode. It is clear from the evidence that SP7 had picked up the second accused and SP12 from a spot requested by the second accused right after the commission of the offence. SP7 had also helped the second accused and SP12 to stay in two budget hotels. The second accused had given SP7 the gold bracelet to be sold. SP7 had also come to know that the deceased had died on the day he had picked up the second accused and SP12.

[29] From the role he played, SP7 could have suspected something was amiss but purposely kept silent about it. Going by the above interpretation of accomplice SP7 cannot be regarded as an accomplice by merely suspecting an offence had been committed. That too, in this case he might have suspected the offence of theft being committed by the second accused but certainly not murder.

[30] SP6 meanwhile had absolutely no role to play as he had been handed by the bracelet by his wife to be pawned and he did so without knowing the origin of the gold bracelet.

[31] In short after assessing the evidence in this case I could not regard SP6 and SP7 as accomplices. I therefore accepted the veracity of the evidence of these witnesses as normal competent witnesses who had no reason to lie.

(ii) SP12

[32] SP12 on the other hand fell squarely within the definition of an accomplice and going by her own admission had taken part in the commission of the crime.

[33] Again using *Sarkar on Evidence* as a guide at p 2079 elaborating on the approach to be taken in evaluating accomplice evidence taking into account ss 133 and 114(b) of the Evidence Act 1950 it is stated as follows:

> There is absolute no rule of law that accomplice evidence must be corroborated. This is s 133, But as Martin B said in (*R v Boyes* 9 Cox CC 32) 'there is a rule of practice which has become so hallowed as to be deserving respect. I believe these are the very words of Lord Abinger — it deserves to have all the reverence of law.' This rule of guidance is to be found in s 114 illus (b). Both the sections are parts of one subject and should always be considered together ...
>
> On the whole, the combined result of two sections [ss 133 and 114 illus (b) says Phear j (in *R v Sadhu Mandal*, at 21 WR Cr 69,79):-
>
> > Appears to be that the legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, ie , so far as his testimony implicate an accused person unless he is corroborated in material particulars in respect to that person; that it is the duty of the court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude the testimony or not; in other words to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case; though at the same time the court may rightly in exceptional cases notwithstanding that maxim, and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if he sees good reasons for doing so upon grounds other than, so to speak, the personal corroboration.

[34] In evaluating the evidence of SP12 there was one pertinent matter I had to consider. This was the evidence of bad blood between SP12 and the second accused. This arose as a result of SP12 leaving her child to be taken care of by the second accused and her husband. The child was later however returned back to SP12. At that point SP12 had suspected that the child was assaulted

and SP12 had lodged a police report to this effect. This matter was however resolved and SP12 had withdrawn her complaint.

[35] I took note that this incident had happened two years prior to the commission of the offence in this case. There was also evidence that SP12 had made peace with the second accused and had been in constant touch with the second accused. This is borne out by the fact that SP12 had visited the second accused before and this was a second time she had come to ask for aid.

[36] Taking these circumstances into consideration I decided there was no animosity between SP12 and the second accused at the present time. Further I could not detect that SP12's testimony in court was spurred by any hatred towards the second accused.

[37] More importantly SP12's evidence was corroborated by other independent evidence and circumstances of the case. The fact that SP12 was in the house where the deceased was found dead is supported by the evidence of SP2 and SP3. Further SP3 had seen SP12 in the house prior to his departure from the house.

[38] SP7 corroborated the evidence of SP12 of the events after SP12 and the second accused had left the house after the commission of the offence. The fact that the two accused and SP12 fled the scene supports the commission of the offence.

[39] Another cogent piece of evidence which supported the evidence of SP12 that a pillow had been used to smother the deceased was supported by the evidence of the police officers finding the pillow containing the DNA of the second accused on the information of the second accused.

[40] In short I had no reason to disbelieve the evidence of SP12 as to what both the accused had done to the deceased. This was virtually an eyewitness account of the events which could not be easily brushed aside.

Medical evidence

[41] A matter which bothered me more than the evidence of an accomplice was the inconclusive post-mortem report as to the cause of death of the deceased. I took into account that this was not due to the incompetence of the doctor but rather to the fact that the body of the deceased had decomposed.

[42] However to my mind a conclusive report of cause of death was not necessary in this case. This is because the circumstances of this case are such that a reasonable inference can be drawn that the deceased died by being

smothered with a pillow. This fact is derived from the testimony of SP12 that the deceased had initially made some faint sounds on being smothered but after a while she became absolutely still. SP12 herself checked and confirmed that the deceased had died. There was also evidence that on the day in question the deceased was healthy and had in fact eaten with both the accused and only then she had slept.

Evidence of information leading to discovery of weapon of offence

[43] In this case there was evidence of information leading to the discovery of the weapon of offence in this case the pillow. The evidence of this was provided by SP8. The defence tried to raise the possibility that the pillow was found without the aid of the second accused. I however chose to believe the testimony of SP8 which was supported by the evidence of forensic officers who went together with SP8 to the scene of the crime.

[44] Information leading to discovery is a relevant piece of evidence against the accused as stated in s 27(1) of the Evidence Act which states as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates to the fact thereby discovered may be proved.

[45] The importance in the information provided by the second accused is not so much to its contents but the fact that it supports the evidence of SP12 that the deceased was smothered with a pillow.

Conduct of the accused

[46] Linked to the discovery of the pillow on the information of the second accused together with the fact that both the accused had fled the scene after the commission of the offence as well the recovery of the gold bracelet belonging to the deceased in the possession of the second accused indicates a guilty conduct.

[47] Another potent evidence of conduct of the accused was the evidence of SP2. SP2 being the daughter of the deceased had often visited the deceased. However on the day of the incident SP2 noticed a changed atmosphere when she went to the house and noticed that both the accused were in the kitchen preparing food. According to SP2 this seldom happened and at times she had to bring food to the deceased as the accused had refused to cook. Both the accused were also behaving extremely nice which was rare.

[48] It maybe a woman' intuition but SP2 felt that both the accused were planning something bad and a thought crossed her mind that maybe the accused were planning to poison the deceased. SP2 had left the house with this uneasy feeling intact.

[49] The above facts represent conduct of the accused both before the commission of the offence as well as after commission of the offence. Both this conduct are relevant facts to be considered by the court in incriminating the accused (s 8 of the Evidence Act 1950).

[50] Illustration (i) of s 8 of the Evidence Act 1950 covers the above facts in essence. It states as follows:

> A is accused of a crime
>
> The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

DECISION AT THE END OF THE PROSECUTION'S CASE

[51] Taking in totality the evidence in this case I was satisfied that all the ingredients necessary to prove a common intention to commit murder had been adduced by the prosecution in this case.

[52] The evidence of SP12 had shown a pre-arranged plan between both the accused as well as SP12 to cause the death of the deceased. This to me satisfies the provision of s 34 of the Penal Code which states as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[53] From the evidence of SP12 it is clear that the act of smothering the deceased was done with the sole intention of causing her death. This satisfies the provisions of ss 299 and 300 of the Penal Code.

[54] The relevant portion of s 299 reads as follows:

> Whoever causes death by doing an act with the intention of causing death, ... commits the offence of culpable homicide.

[55] The relevant portion of s 300 states as follows:

> Except in the case hereinafter excepted, culpable homicide is murder —

(a) if the act by which death is caused is done with the intention to cause death.

THE DEFENCE

[56] The first accused chose to give unsworn statement and basically her defence was of a bare denial. In a nutshell the first accused stated that she was not at the scene of the crime as she had left to go to her fiancees house.

[57] The second accused apart from denying any part in the death of the deceased further alleged that all the prosecution witnesses implicating her were lying. The second accused denied that she had given a gold bracelet to be sold by SP7 and she denied that SP7 had given her some money for the bracelet to be given to SP12.

[58] The second accused alleged that SP8 was lying that she had given information leading to the discovery of the pillow. According to second accused she had no knowledge of the pillow. She further asserted that the police had found the pillow themselves.

[59] Finally the second accused said that SP12 bore a grudge against her for returning back SP12's child to her prompting SP12 lodging a police report against her husband. The accused further denied that she had discussed a plan with the first accused and SP12 to kill the deceased.

EVALUATION OF THE DEFENCE

[60] It is trite law that there is no burden upon the accused to prove their defence or even lead evidence to establish their defense. This principle has been enumerated in many cases.

[61] Nevertheless if s 180 of the Criminal Procedure Code is scrutinised the defense do bear a duty to explain or rebut the prosecution evidence. The relevant portion is worded as follows:

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credibie evidence proving each ingredient of the offence, which if unrebutted or unexplained would warrant a conviction.

[62] In this case since I have ruled that the prosecution has proven a prima facie case, to escape conviction the least the accused should do is to explain away the facts adduced by the prosecution.

[63] This duty upon the accused has been termed as evidential burden in the

A case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 which has held as follows:

> Prove beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is evidential burden on the accused to raise a reasonable doubt.

B

[64] Following the above principles, the defence of the first accused was a bare denial hardly explaining away the evidence against her including the eyewitness account of SP12. I could not fathom even a fanciful doubt in her
C defense let alone a reasonable doubt.

[65] Similarly the only explanation forwarded by the second accused was to allege everyone else was telling lies except her. Comparing the second accused testimony against the testimony of SP8, SP7 and SP12 I chose to believe their
D evidence rather than the evidence of the second accused.

[66] In short the accused had failed to raise any reasonable doubt in the case of the prosecution. In the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 in explaining what amounts to reasonable doubt it was stated as
E follows:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of case which after the entire comparison and consideration of all evidence leaves the minds of the jurors in that condition that they cannot say they feel an
F abiding conviction to a moral certainty of the truth of the charge.

DECISION AT THE END OF THE CASE

[67] The duty of the court at the conclusion of the trial is spelled in
G s 182A(1) of the Criminal Procedure Code which reads as follows:

> At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

H

[68] What amounts to beyond reasonable doubt has been stated in the case of *Liew Kaling v Public Prosecutor* [1960] 1 MLJ 306b as follows:

> That the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond
I the shadow.

[69] Looking at the totality of the evidence in this case I was satisfied that the prosecution had proven the charge against both the accused beyond reasonable doubt. I therefore found both the accused guilty of the charge.

THE SENTENCE

[70] As the first accused was a child under the Child Act 2001 at the time of the commission of the offence I ordered for a probation report which was duly tendered in court. Although the first accused came from a broken and splintered family there was nothing to indicate that she was driven to commit the crime for some cogent reason. In fact she was a voluntary participant and took on an active role.

[71] For this reason I could not accede to the request of the defence counsel to bind her for good behavior. I felt that the first accused needed to be imprisoned at the pleasure of the Ruler of the state until such a time she was truly rehabilitated. In complying with s 97 of the Child Act 2001 I so ordered.

[72] For the second accused there was only one sentence facing her that was death by hanging as this was also not a fit case to just bind her over for good behavior.

Order accordingly.

Reported by Kanesh Sundrum